79-607

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1979

ADVOCATES FOR THE HANDICAPPED, an Illinois corporation and DENNIS KLAPACZ, on his own behalf and on behalf of all others similarly situated,

Petitioners,

vs.

SEARS ROEBUCK & COMPANY, a New York corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

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I. Kovarsky, Discrimination in Employment, 150 (1976) 21

Larson, Employment Discrimination, Vol. 4, ch. 22 §104.20 (1978) 22

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

The Petitioners, ADVOCATES FOR THE HANDICAPPED AND DENNIS KLAPACZ, respectfully pray that this matter be heard by the Supreme Court of the United States by writ of certiorari to review the judgment and opinion of the Appellate Court of Illinois, First District, entered in this cause on December 20, 1978. Because the Illinois Supreme Court denied Petitioners' Petition for Appeal as a Matter of Right or, in the alternative, Petition for Leave to Appeal and their Petition for Reconsideration, without opinion, the opinion and judgment of the Appellate Court of Illinois, First District, is the final judgment of the highest Court of the State of Illinois.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, is reported at 67 Ill.App.3d 512, 385 N.E. 2d 39 (1978), and is reprinted in the Appendix to this petition (A. 1a-11a).

JURISDICTION

The judgment of the Appellate Court of Illinois, First District, was entered on December 20, 1978. The Supreme Court of Illinois denied, without opinion, Petitioners' Petition to Appeal as a Matter of Right or, in the alternative, Petition for Leave to Appeal and their Petition for Reconsideration, on March 29, 1979 and on May 15, 1979, respectively (A. 12a and 13a). On August 17, 1979 this Court granted Petitioners' application for an order extending time to file Petition for Writ of Certiorari. This Court's jurisdiction is invoked under 28 U.S.C., §1257(3).

QUESTIONS PRESENTED

1. Has the exclusion of Dennis Klapacz from that class of persons intended to benefit from rights established under Article 1, Section 19 of the Illinois Constitution of 1970 and the Illinois Equal Opportunities for the Handicapped Act, as a result of the interpretation and application of those laws adopted by the court below, violated Petitioner's right to due process and equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution?

2. In a case of first impression, where the court below held that the term "physical or mental handicap" under Article 1, Section 19 of the Illinois Constitution of 1970 and the Illinois Equal Opportunities for the Handicapped Act encompasses only a physical or mental con-

dition "generally perceived as one which severely limits the individual in performing work-related functions", was it a violation of the due process clause of the Fourteenth Amendment of the United States Constitution, for the Appellate Court to conclusively presume that Petitioner Klapacz's disability does not fall within the purview of the Illinois Constitution or the Illinois Equal Opportunities for the Handicapped Act without first affording Petitioner an opportunity to present evidence as to the nature and extent of his physical disability?

3. Did the Illinois Supreme Court violate the due process clause of the Fourteenth Amendment to the United States Constitution by denying Petitioners' Petition To Appeal as a Matter of Right when Article 6, Section 4(c) of the Illinois Constitution of 1970 requires that appeals from the Appellate Court shall lie to the Supreme Court of Illinois as a matter of right in cases where a question under either the Constitution of the United States or of Illinois arises for the first time in and as a result of the action of the Appellate Court?

4. Does the conflict in the definition of a physical or mental handicap among the laws of the States and between Federal and State law present so substantial a question as to invoke the plenary consideration of the issue by the Supreme Court of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States: Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Illinois Constitution of 1970, Article 1, Section 19:

(a) Article 1, Section 2:

No person shall be deprived of life, liberty or property without due process of law nor be denied equal protection of the laws.

(b) Article 1, Section 19:

All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.

(c) Article 6, Section 4(c):

Appeals from the Appellate Court to the Supreme Court are a matter of right if a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court, or if a division of the Appellate Court certifies that a case decided by it involves a question of such importance that the case should be decided by the Supreme Court. The Supreme Court may provide by rule for appeals from the Appellate Court in other cases.

3. Illinois Equal Opportunities for the Handicapped Act, Illinois Revised Statutes, chapter 38, §§65-21 *et seq.* (1971) (the "Act"). Specifically,

(a) Section 65-21 of the Act:

It is the policy of this State, as set forth in Article I, Section 19 of the Illinois Constitution of 1970, to

guarantee physically and mentally handicapped persons the fullest possible participation in the social and economic life of the State, to engage in remunerative emplyoment, and to secure housing accomodations of their choice.

The right to employment otherwise lawful without discrimination because of physical or mental handicap, where the reasonable demands of the position do not require such a distinction, and the right to the purchase or rental of property without discrimination because of physical or mental handicap are hereby recognized as and declared to be the rights of all the people of the State. It is hereby declared to be the policy of the State to protect these rights and this Act shall be construed to effectuate such policy.

(b) Section 65-22 of the Act:

The term 'physical or mental handicap' means a handicap unrelated to one's ability to perform jobs or positions available to him for hire or promotion or a handicap unrelated to one's ability to acquire, rent and maintain property. It does not constitute evidence of 'one's ability to perform jobs or positions available to him for hire or promotion' or 'one's ability to acquire, rent and maintain property' that a person has been treated as a person in need of mental treatment as defined by the Mental Health Code of 1967, as now or hereafter amended, or that the person has or is alleged to have undergone mental treatment or evaluation.

(c) Section 65-23 of the Act:

It is an unlawful employment practice for an employer:

(1) to refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to his terms, conditions or privileges of employment, otherwise lawful, because of such individual's physical or mental handicap, unless it can be shown that the particular handicap prevents the performance of the employment involved.

4. Rehabilitation Act of 1973, 29 U.S.C., §706(6):

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

STATEMENT OF THE CASE

A. The Facts

In September, 1974, Petitioner Dennis Klapacz underwent kidney transplant surgery at the Billings Hospital of the University of Chicago. For the preceding two years Klapacz received dialysis treatment — the consequence of ten years of kidney degeneration due to nephritis. Upon his release from Billings Hospital on December 24, 1974, the condition of Petitioner Klapacz was stable; the prognosis for his return to work was "good". However, Klapacz was ordered by his doctors to refrain from engaging in any physical activity involving heavy lifting.

In January, 1975, Petitioner Klapacz applied for employment with Sears Roebuck & Company. Several employment tests were administered to Klapacz by Sears which Klapacz passed successfully. Sears then advised Klapacz that a position would be made available to him upon receiving clearance from Sears' medical department.

However, Sears' medical department examined Klapacz and concluded that he was an "uninsurable risk" under the guidelines of Sears' self-insured insurance plan. It is admitted, and was assumed by the Illinois Appellate Court, that Dennis Klapacz was denied employment by Sears because of his physical disability—notwithstanding his undisputed ability to perform the employment duties required.

The Advocates for the Handicapped is an Illinois not-for-profit corporation. The Advocates is directly engaged in a variety of activities intended to promote and protect the rights of handicapped individuals, including equal opportunity for employment. Klapacz is a member of The Advocates.

B. The Proceedings Below

The Pleadings. The Advocates and Klapacz, on his own behalf and on behalf of similarly situated persons, brought an action against Sears seeking a declaratory judgment and damages. Petitioners alleged that Sears discriminated against handicapped individuals by its failure to hire otherwise qualified, physically handicapped persons in violation of Article 1, Section 19 of the Constitution of the State of Illinois (1970) and the Equal Opportunities for the Handicapped Act (Ill.Rev.Stat. ch. 38, §§ 65-21, *et seq.*, the "Act").

Respondent moved to strike and dismiss the complaint on the grounds, *inter alia,* that based on the facts alleged in the Amended Complaint, Klapacz was not physically handicapped.

C. The Decisions Below

The trial court granted Respondent's motion and entered an order finding, as a matter of law, that Klapacz was not handicapped and therefor was neither within the protection of the Act nor a member of the class he purported to represent and that Advocates lacked standing to maintain the cause of action. (A. 14a).

Respondent appealed to the Appellate Court of Illinois, First District. The Appellate Court held that Klapacz was not handicapped within the scope of Article 1, Section 19 of the Illinois Constitution and the Act, after defining the term "physical or mental handicap" to encompass only a physical or mental condition which is "generally perceived as one which severely limits the individual in performing work-related functions". (A. 9a). The Appellate Court also ruled that Advocates' claims must fail in light of the Court's holding with respect to Klapacz.

Petitioners filed a Petition to Appeal as a Matter of Right to the Illinois Supreme Court or in the alternative for Leave to Appeal. The Petition was denied without opinion by the Supreme Court of Illinois as was Petitioners' Petition for Reconsideration. (A. 12a and 13a). Before the Illinois Supreme Court, Petitioners argued that the interpretation and application of the Illinois Constitution and the Act adopted by the Illinois Appellate Court resulted in a deprivation of Dennis Klapacz's rights under the Fourteenth Amendment of the United States Constitution. There are no other decisions in the State of Illinois interpreting Article 1, Section 19 of the Illinois Constitution. The refusal of the Illinois Supreme Court to hear an appeal acts as an affirmation of the opinion of the Illinois Appellate Court construing Article 1, Section 19 of the Illinois Constitution of 1970.

The law of the State of Illinois, as a result of the decision by the court below, is that only those otherwise qualified persons whose disabilities are "generally perceived" to severely limit them in work-related functions are protected against employment discrimination while otherwise qualified disabled persons, whose disabilities are not "generally perceived" to severely limit them in work related functions, but who are nevertheless the subjects of employment discrimination based on actual physical or mental disabilities, are not so protected.

This case also presents questions of great significance not only to citizens of the State of Illinois but to all citizens of the United States. The opinion of the Appellate Court creates a dual standard for handicapped persons in Illinois — one standard under the Rehabilitation Act of 1973 and another under the Illinois Constitution and the Act. In addition, the opinion of the Appellate Court creates a direct conflict between the State of Illinois and her sister states with respect to fundamental rights of handicapped persons. The questions presented are so substantial as to require plenary consideration of the rights of handicapped citizens by the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

I. THE INTERPRETATION AND APPLICATION OF ARTICLE 1, SECTION 19 OF THE ILLINOIS CONSTITUTION OF 1970 AND THE ILLINOIS EQUAL OPPORTUNITIES FOR THE HANDICAPPED ACT ADOPTED BY THE APPELLATE COURT IS REPUGNANT TO PETITIONERS' RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner Klapacz is a man who suffered from nephritis for ten years and was compelled to undergo a kidney transplant that left him unable to engage in any physical activity involving heavy lifting. Notwithstanding his physical disability, Petitioner Klapacz has been excluded from the class of handicapped persons entitled to be protected against employment discrimination unrelated to ability established by Article 1, Section 19 of the Illinois Constitution of 1970 and the Illinois Equal Opportunities for the Handicapped Act (Ill.Rev.Stat., ch. 38, §§65-21 *et seq.*) (the "Act"), because the Appellate Court concluded, as a matter of law, that Petitioner is not a handicapped person under the Illinois Constitution.

Article 1, Section 19 of the Illinois Constitution of 1970 sets forth a clear and unequivocal mandate against unlawful discrimination against *all* persons with a physical or mental handicap. Section 19 provides:

> All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.

The constitutional mandate is neither restricted nor qualified by the severity or the degree of an individual's physical or mental handicap. The scope of Section 19 is, on its face, all inclusive—its purpose and intent are clear: *all* persons are to be free of discriminatory employment practices arising from physical or mental conditions unrelated to employment performance or ability.

The legislative purpose and intent of Article 1, Section 19 of the Illinois Constitution is set forth in the Illinois Equal Opportunities for the Handicapped Act, 38 Ill.Rev. Stat. ch. 38, §65-21:

> It is the policy of this State to set forth in Article 1, Section 19 of the Illinois Constitution of 1970, to guarantee physically and mentally handicapped persons the fullest possible participation in the social and economic life of the State, to engage in remunerative employment and to secure housing accomodations of their choice.
>
> The right to employment otherwise lawful without discrimination because of physical or mental handicap, where the reasonable demands of the position do not require such distinction, and the right to the purchase or rental of any property without discrimination because of physical or mental handicap are hereby recognized as and declared to be the rights of all people of the State. It is hereby declared to be the policy of the State to protect these rights and this Act shall be construed to effectuate such policy.

The Appellate Court disregarded statements made by delegates to the Illinois Constitutional Convention indicating that the class of persons intended to benefit from Article 1, Section 19 consists of a broad range of physical

and mental disabilities. Constitutional convention delegate Anderson, after drawing the convention's attention to a report of a 20/20 vision employment standard required by a manufacturer and used as a defense by the manufacturer in denying employment to applicants with myopic vision, stated:

> This kind of an amendment would help . . . the physically and mentally handicapped . . . to find the kind of employment that they are capable of performing. This area of discrimination, in many ways, is more pernicious than that imposed upon minority groups or by sex. (5 Record of Proceedings, Sixth Illinois Constitutional Convention, 3681.)

Delegate Tomei expressed his concern about employment discrimination based on physical or mental handicap as a result of his wife's "mild physical handicap" and emphasized that handicapped persons that have the ability to perform the job should not be denied employment "simply because they somehow look different or seem a little bit out of the ordinary." (5 Record of Proceedings, Sixth Illinois Constitutional Convention, 3681.)

The evil addressed by the Illinois legislature and intended to be abolished by the enactment of Article 1, Section 19 and the Act was employment discrimination — specifically that employment discrimination directed against disabled persons for reasons unrelated to their disabilities. The plain language of the Illinois Constitution and the Act reveals that the Appellate Court's concern for extending the coverage of the Constitution beyond its intended scope was patently unfounded and unreasonable:

> It is the policy of this State . . . to guarantee physically and mentally handicapped persons the *fullest possible participation* in the social and economic life of the State, to engage in remunerative employment and to secure housing accomodations of their choice. (Ill.Rev.Stat., ch. 38, §65-21, emphasis supplied.)

Notwithstanding this clear language and broad purpose of the Illinois Constitution and the Act to prohibit all discrimination in employment because of physical or mental disabilities unrelated to employment performance or ability, the Illinois Appellate Court defined the term "physical or mental handicap" to encompass only a physical or mental condition which is "generally perceived as one which severely limits the individual in performing work-related functions." (A. 9a). Because the classification adopted by the Appellate Court is not rationally related to the achievement of the legislative goals, it violates the due process clause and equal protection clause of the Fourteenth Amendment of the United States Constitution. *Richardson* v. *Belcher,* 404 U.S. 78 (1971); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Postal Telegraph Cable Co.* v. *City of Newport, Ky.,* 247 U.S. 464 (1918); *Smith* v. *Texas,* 233 U.S. 630 (1914); *Yick Wo.* v. *Hopkins,* 118 U.S. 356 (1886).

Even if the classification among disabled persons adopted by the Appellate Court were construed to be rationally related to some permissible state objective, the classification would still be unconstitutional under recent Supreme Court decisions. The Supreme Court has consistently held that classifications involving physical characteristics over which a person has no control must be *substantially related to important governmental objectives. See, e.g., Craig* v. *Boren,* 429 U.S. 190, 197 (1976) (gender related distinction); *Califano* v. *Goldfarb,* 430 U.S. 99, 211 (gender related distinction) (1977); *Trimble* v. *Gordon,* 430 U.S. 313 (1977) (distinction based upon legitimacy).

See, generally, Gunther, *The Supreme Court, 1971 Term—Forward: In Search Of Evolving Doctrine On A Changing Court: A Model of a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972); Note, *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 72, 177-188 (1977). Petitioners submit that classifications among disabled persons or between disabled persons and non-disabled persons are as invidious as are classifications based upon gender, legitimacy, or alienage. In this case, given the purpose and language of the Illinois Constitution articulated above, the classification of the Appellate Court must fail under such scrutiny. Furthermore, because no case involving the equal protection claims of disabled persons has ever been heard by this Court, an important novel issue is raised as to the standard to be used in analyzing the equal protection claims of the disabled.

The absence of a rational basis for the Appellate Court's interpretation of the Illinois Constitution and the Act is further demonstrated by the definitions of "physical or mental handicap" adopted by the United States Congress and by other courts. Section 7(6) of the Rehabilitation Act of 1973, 29 U.S.C., defines "handicapped individual" as follows:

> The term 'handicapped individual' means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter. For the purposes of subchapters IV and V of this chapter, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) *is regarded as having such an impairment.* (emphasis supplied.)

In addition to the Rehabilitation Act of 1973, if the court below had looked to the definition of "physical or mental handicap" adopted by courts in sister states, it would have included Petitioner Klapacz within the class of persons entitled to the protection of the Illinois Constitution and the Act. The Oregon Supreme Court has considered a heart condition to be a physical handicap, *Montgomery Ward & Co.* v. *Bureau of Labor,* 280 Or. 163, 570 P.2d 76 (1977), as has an Appellate Court in New Jersey, *Panettieri* v. *C.V.Hill Refrigeration,* 159 N.J. Super. 472, 388 A. 2d 630 (1978). By implication, the United States District Court for the Northern District of Illinois in *Magruder* v. *Selling Areas Marketing, Inc.,* 439 F.Supp. 1155, 1165, (N.D. Ill. 1977) considered cancer, as well as heart conditions, to be a physical handicap. The United States District Court, Middle District of Florida has held a history of epilepsy (apparently cured) to be a physical handicap, *Duran* v. *City of Tampa,* 430 F.Supp. 75 (M.D. Fla. 1977). The Supreme Court of the State of Washington held a history of knee surgery to be a physical handicap in *Chicago, M. St. P. & P. R.R. Co.* v. *Washington State Human Rights Commission,* 87 Wash. 2d 802, 557 P. 2d 307 (1976), as well as cerebral palsy, *Holland* v. *Boeing Co.,* 90 Wash. 2d 384, 583 P.2d 621 (1978). The Connecticut Supreme Court found a visual disability to be a physical handicap, *Conn. Inst. for the Blind* v. *Commission on Human Relations,* 18 FEP Cases 42 (Conn. 1978). The Wisconsin Supreme Court concluded that a history of asthma was a physical handicap, *Chicago M. St. P. & P. R.R. Co.* v. *Wisconsin,* 62 Wis. 2d 392, 215 N.E.2d 443

(1974). The Wisconsin Circuit Court has found physical handicaps to include diabetes, *Fraser Shipyards, Inc.* v. *Wisconsin Department of Industry, Labor and Human Relations,* 13 FEP Cases 1809 (1976), as well as a deviated septum, *Journal Co.* v. *Wisconsin Department of Industry, Labor and Human Relations,* 13 EPD ¶11, 400 (1976), and the same court has found a back condition to be a physical handicap. *Buryrus-Erie Co.* v. *Wisconsin Department of Industry, Labor and Human Relations,* 13 EPD ¶11, 580 (1977).

The Appellate Court's unreasonably restrictive definition of handicap is contrary to the fundamental principal that remedial legislation is to be interpreted liberally to assure achievement of its intendments. *Tcherepin* v. *Knight,* 389 U.S. 332 (1967); *Zehender & Factor* v. *Murphy,* 386 Ill. 358, 53 N.E. 2d 944 (1944).

The interpretation adopted by the Appellate Court will exclude, in operation and effect, thousands of persons the Illinois legislature intended to benefit from the constitutional and legislative provisions. The Appellate Court's definition of "physical or mental handicap", if permitted to stand, will permit persons with epilepsy, heart disease, cancer, and a wide variety of orthopedic and neurological disabilities to be denied employment solely on the basis of their disabilities—even though they meet the job qualifications. This exclusion of persons afflicted with disabilities clearly intended to be protected by the Illinois Constitution is impermissible under the Fourteenth Amendment of the Constitution of the United States.

II. THE INTERPRETATION AND APPLICATION OF ARTICLE 1, SECTION 19 OF THE ILLINOIS CONSTITUTION AND THE ACT ADOPTED BY THE COURT BELOW CONSTITUTES A CONCLUSIVE PRESUMPTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Appellate Court's interpretation and application of the Illinois Constitution to hold that Petitioner Klapacz and the class of persons he represents are not handicapped, as a matter of law, has effectively created a conclusive presumption in violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. When the presumption so created by the State is not universally true in fact, and when the State has reasonable alternative means of making the crucial determination, the due process clause of the Fourteenth Amendment of the United States Constitution forbids such a presumption. *Vlandis* v. *Kline,* 412 U.S. 441 (1973); *Stanley* v. *Illinois,* 405 U.S. 645 (1972); *Gurmankin* v. *Costanzo,* 556 F.2d 184 (3rd Cir. 1977); *Duran* v. *City of Tampa,* 430 F. Supp. 75 (M.D. Fla. 1977).

Whether a specific physical or mental condition such as that which afflicts Petitioner Klapacz is "generally perceived" to impose a limitation upon one's ability to perform work-related functions is a fact question. Even assuming, *arguendo,* that there are some persons with kidney problems which do not constitute severe barriers to their ability to perform work-related functions, it is evident that there are a number of persons whose kidney conditions would be "generally perceived" to impose such barriers. The Appellate Court's conclusive presumption

that Dennis Klapacz is not physically handcapped under its own definition is neither necessarily nor universally true or fairly determined and is, therefore, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution. *See Cleveland Board of Education* v. *La Fleur,* 414 U.S. 647 (1974); *Gurmankin* v. *Costanzo,* 556 F.2d 184 (3rd. Cir. 1977).

On appeal, the Appellate Court defined the term physical or mental handicap for the first time. Pursuant to the Appellate Court's definition, the ruling of the trial court dismissing Petitioner's Amended Complaint as a matter of law was affirmed. As a result of the opinion and judgment of the court below, Petitioner Klapacz has been denied an opportunity to present evidence that he is physically handicapped under Article 1, Section 19 of the Illinois Constitution, as defined by the Illinois Appellate Court. This is precisely the kind of unfair presumption that has repeatedly been held to violate the Fourteenth Amendment of the United States Constitution.

III. THE SUPREME COURT OF ILLINOIS ERRED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT DENIED PETITIONERS' PETITION FOR APPEAL AS A MATTER OF RIGHT FROM THE OPINION AND JUDGMENT OF THE APPELLATE COURT.

Under Article 6, Section 4(c) of the Illinois Constitution of 1970, Petitioners were entitled as a matter of right, to appeal to the Illinois Supreme Court from the opinion and judgment of the Appellate Court. Appeals from the Appellate Court to the Supreme Court lie as a matter of right if a question under the Constitution of the United States or the State of Illinois arises for the first time in and as a result of the action of the Appellate Court. (Article 6, Section 4(c) of the Illinois Constitution of 1970.)

In the instant case, the trial court granted Respondent's motion to dismiss the Complaint and amended Count I of the Complaint after finding as a matter of law that Dennis Klapacz was not a handicapped person within the protection of the Act. (A. 14a.) The only question raised in the trial court with respect to Article I, section 19 of the Illinois Constitution of 1970 was Respondent's argument that the term "physical or mental handicap" is so vague, uncertain, ambiguous and indefinite that it violates Article I, Section 2 of the Illinois Constitution of 1970 and the Fourteenth Amendment of the United States Constitution. The *definition* of "physical or mental handicap" under the Illinois Constitution was not raised in or considered by the trial court nor did the trial court address Respondent's constitutional argu-

ment. The trial court simply found that Petitioner, Dennis Klapacz, was not "handicapped" either as a matter of law or within the protection of the Illinois Equal Opportunities for the Handicapped Act. (A. 14a.)

The Appellate Court did raise a constitutional issue under Article I, Section 19 of the Illinois Constitution when it held, for the first time by any Illinois court, that the term "physical or mental handicap", contained in Article I, Section 19 of the Illinois Constitution of 1970, encompassed only that class of physical or mental condition which is "generally perceived as one which severely limits the individual in performing work-related functions." (A. 9a.) Thus, the question as to who is a physically or mentally handicapped person under the Illinois Constitution of 1970 was addressed for the first time in the action of the court below in this case. Notwithstanding this fact, the Supreme Court of Illinois denied, without opinion, Petitioners' Petition for Leave to Appeal as a Matter of Right or in the alternative Petition for Leave to Appeal and their Petition for Reconsideration, both timely filed. (A. 12a and 13a.)

The Supreme Court of Illinois was obligated under Article 6, Section 4(c) and Article 1, Section 2 of the Illinois Constitution of 1970 to grant Petitioners' an appeal as a matter of right. Denial of Petitioners' Petition to Appeal as a Matter of Right violates Article 6, Section 4(c) of the Illinois Constitution and the due process clause of both the Illinois Constitution and the Fourteenth Amendment to the Constitution of the United States. Petitioners argued in their Petition to the Illinois Supreme Court that the holding of the Appellate Court de-

prived Petitioner, Dennis Klapacz, of rights guaranteed by the Fourteenth Amendment of the United States Constitution. As a consequence of the failure of the Illinois Supreme Court to address a question arising under both the Constitution of the United States and the Constitution of the State of Illinois, which arose for the first time in and as a result of the action of the Appellate Court, Petitioner Klapacz has been denied his fundamental right to a full and fair trial and appeal.

IV. THE CONFLICT IN THE DEFINITION OF HANDICAPPED INDIVIDUAL AMONG THE STATES AND BETWEEN FEDERAL AND STATE LAW PRESENTS A QUESTION SO SUBSTANTIAL AS TO REQUIRE THE PLENARY CONSIDERATION OF THE RIGHTS OF HANDICAPPED CITIZENS BY THE SUPREME COURT OF THE UNITED STATES.

The issue of employment discrimination directed against handicapped individuals effects a significant number of United States' citizens. One estimate places the number of physically handicapped persons subject to employment discrimination in the United States at 14 million. (I. Kovarsky, *Discrimination in Employment,* 150 (1976)) Another source estimates that as many as 15 million persons may be entitled to protection under federal legislation designed to eradicate discrimination against the handicapped. (Lublin, *Lowering Barriers,* Wall Street Journal, Jan. 27, 1976, at 1, col. 1 (referring to a Department of Labor estimate)).

Rampant discrimination against otherwise qualified physically handicapped persons has been widely recognized. A substantial effort has been made by legisalative bodies, both

State and Federal, to provide a remedy for handicapped persons denied employment opportunities for reasons unrelated to their ability to do the job. Thirty-six (36) states, the District of Columbia and New York City have passed laws proscribing unlawful discrimination against handicapped citizens. (Larson, *Employment Discrimination*, Vol. 4, ch. 22, §104.20 (1978)). The United States Congress recognized the need to protect the handicapped against unlawful employment discrimination by the enactment of the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq.* Notwithstanding these legislative efforts, employment discrimination against otherwise qualified handicapped persons continues. Petitioners submit that the actions of Respondent in this case confirm this fact.

Because of the large numbers of otherwise qualified handicapped persons who are subjected to employment discrimination, and the conflict among State court decisions and between State and Federal laws relating to the employment rights of the handicapped, Petitioners submit that it is appropriate and necessary for the Supreme Court of the United States to provide guidance in determining whether and to what extent otherwise qualified handicapped persons are to enjoy equal employment opportunities in the United States.

CONCLUSION

Subtle distinctions between "mild" and "severe" disabilities invites arbitrary and capricious application of the Illinois Constitution and cannot be countenanced if the net effect is, as it certainly will be, to perpetuate the attitudes the legislation was intended to destroy. Surely,

if an analysis of the degree of disability is to be the standard applied by the courts of Illinois, then that analysis should not be made as a matter of law but only after a full evidentiary hearing, to assure due process of law under the Fourteenth Amendment of the United States Constitution.

The interpretation and application of Article 1, Section 19 of the Illinois Constitution and the Illinois Equal Opportunities for the Handicapped Act adopted by the Appellate Court is so arbitrary and capricious and so utterly lacks a substantial relationship to important governmental objectives that it shocks the conscience and deprives Petitioner Klapacz of his right to due process and equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States

For the foregoing reasons, Petitioners pray that the Supreme Court of the United States hear this cause by writ of certiorari to review the judgment and opinion of the Appellate Court of Illinois, First District.

Respectfully submitted,

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Chicago, Illinois 60602
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Of Counsel:
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APPENDIX

67 Ill.App.3d 512
385 N.E.2d 39

ADVOCATES FOR the HANDICAPPED, an Illinois Corporation and Dennis Klapacz on his own behalf and on behalf of all others similarly situated,
Plaintiffs-Appellants,

vs.

SEARS, ROEBUCK AND CO., a New York Corporation,
Defendant-Appellee.

No. 76-875.

Appellate Court of Illinois,
First District, Third Division.

Dec. 20, 1978.

Job applicant, on his own behalf and on behalf of all other individuals similarly situated, and nonprofit organization for the handicapped, brought suit against employer for injuries allegedly caused by employer's discriminatory hiring practices. The Circuit Court, Cook County, L. Sheldon Brown, J., dismissed the suit on employer's motion and plaintiffs appealed. The Appellate Court, McGillicuddy, J., held that: (1) question whether a person is "handicapped" within meaning of State Constitution and Equal Opportunities for the Handicapped Act turns upon whether the character of the disability is one which is generally perceived as one which severely limits the individual in performing work-related functions, and (2) job applicant, who underwent kidney transplant resulting only in restriction from lifting heavy weights and who was denied employment for reason that he was uninsurable risk in employer's self-insurance program, was not physically "handicapped" within meaning of State Constitution and Equal Opportunities for the

Handicapped Act nor entitled to protection thereunder; furthermore, nonprofit organization for the handicapped, of which applicant was a member, lacked standing to seek declaratory and injunctive relief.

Affirmed.

1. Statutes 188

Generally, when legislature has failed to provide a specific definition for a term or phrase used in a statute, Appellate Court must presume that term or phrase was intended to be applied in its ordinary and popularly understood meaning.

2. Constitutional Law 14

When interpreting state constitutional provision, words are to be taken in their ordinary acceptance.

3. Labor Relations 7

Question whether a person is "handicapped" within meaning of State Constitution and Equal Opportunities for the Handicapped Act turns upon whether the character of the disability is one which is generally perceived as one which severely limits the individual in performing work-related functions. S.H.A.Const.1970, art. 1, § 19; S.H.A. ch. 38, § 65-21.

See publication Words and Phrases for other judicial constructions and definitions.

4. Appeal and Error 919

In determining whether dismissal of a complaint is proper, Appellate Court must accept dismissed party's allegations as true.

5. Labor Relations 7

Job applicant, who underwent kidney transplant resulting only in restriction from lifting heavy weights and who was denied employment for reason that he was uninsurable risk in employer's self-insurance program, was not physically "handicapped" within meaning of State Constitution and Equal Opportunities for the Handicapped Act nor entitled to protection thereunder; furthermore, nonprofit organization for the handicapped, of which applicant was a member, lacked standing to seek declaratory and injunctive relief on behalf of its members against employer's hiring practices. S.H.A.Const.1970, art. 1, § 19; S.H.A. ch. 38, § 65-21.

Melvin M. Landau, Richard J. Friedman, Edward Parsons, Chicago, for plaintiffs-appellants.

Arnstein, Gluck, Weitzenfeld & Minow, Burton Y. Weitzenfeld and Joseph M. Minow, and Robert B. Hoffman, Chicago, for defendant-appellee.

McGILLICUDDY, Justice:

The plaintiffs, Dennis Klapacz on his own behalf and on behalf of all other individuals similarly situated, and Advocates for the Handicapped, brought suit against Sears, Roebuck and Co., for injuries allegedly caused by Sears' discriminatory hiring practices. The plaintiffs sought declaratory and injunctive relief as well as damages. Following the granting of Sears' motion to dismiss by the Circuit Court of Cook County, the plaintiffs have prosecuted this appeal.

The plaintiffs filed a three-count complaint. They alleged that Klapacz was 22 years of age at the time of filing the complaint and was expecting to graduate from DePaul University with a Bachelor of Science in Business degree by December 1975. For approximately 10 years prior to the initiation of the suit, Klapacz suffered from nephritis. Due to this ailment, he was forced to receive dialysis treatments for a period of two years prior to September 10, 1974. On September 11, 1974, Klapacz received a kidney transplant at Billings Hospital in Chicago. With respect to this operation, the plaintiffs alleged as follows:

". . . On December 27, 1974, his condition was, according to the medical authorities at Billings Hospital, stable. The prognosis for return to work was 'good,' except that Dennis Klapacz was restricted from heavy lifting."

In January 1975 Klapacz applied for employment with Sears at which time he successfully passed all pre-employment tests and was advised that, pending clearance from the medical department, there were positions available for him. However, he failed to receive the required medical certification, allegedly on the grounds that he was an uninsurable risk under Sears' self-insurance program. Consequently, he was not offered a position with the company.

Advocates is a not-for-profit corporation, established for the purpose of promoting "the common needs of the handicapped through advocacy, public education and coordination of effort." The organization is composed of handicapped individuals, parents of handicapped individuals and professionals involved in the rehabilitation of handicapped people. Klapacz is a member of the Advocates organization.

The plaintiffs contend that the actions of Sears violate both article I, section 19 of the Illinois Constitution of 1970 (Ill.Const.1970, art. I, sec. 19) and the Equal Opportunities for the Handicapped Act (Ill.Rev.Stat., 1975, ch. 38, par. 65-21 et seq.). In count I, as amended, all plaintiffs seek an order "declaring that 'insurability' or 'costs of insurance' are considerations not related to whether a particular handicap prevents the performance of the employment involved, within the meaning of the Constitutional and statutory provisions" applicable in Illinois. Likewise, in amended count I, the plaintiffs seek an order enjoining Sears from "discriminating against physically handicapped applicants for employment where the particular handicap does not prevent performance of the employment involved." In count II the plaintiffs request an injunctive order restraining Sears from requiring applicants to submit to a physical examination designed to determine their insurability and from asking any questions concerning the applicants' medical history, where these medical histories are unrelated to the ability of the applicant to perform the work for which he applies. Finally, in count III, Klapacz, solely in his individual capacity seeks damages pursuant to section 9 of the Equal Opportunities for the Handicapped Act. Ill.Rev. Stat., 1975, ch. 38, par. 65-29.

The trial court dismissed the case on two grounds: that Klapacz is not a handicapped person within the meaning of the Equal Opportunities for the Handicapped Act and thus was neither entitled to the protection of the Act, nor a member of the purported class, and that Advocates lacked standing. On appeal the plaintiffs assert that these conclusions are improper. Sears, on the other hand, supports the trial court's decision and raises the additional question of whether the Act is unconstitutionally vague in that it fails to define the phrase "physical and mental handicap"; this latter question was raised in Sears' motion to dismiss but the trial court did not reach this issue.

The first issue we address is whether Klapacz is handicapped within the meaning of article I, section of the 1970 Illinois Constitution and the Equal Opportunities for the Handicapped Act. The Constitutional provision establishes the right of all individuals suffering from a physical or mental handicap to be free from certain forms of discrimination:

> "All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer." (Ill.Const. 1970, art. I, § 19.)

The Equal Opportunities for the Handicapped Act seeks to implement the policy declared by the Constitution in the areas of housing and employment. (Ill.Rev.Stat., 1975, ch. 38, par. 65-21.) Neither the Constitution nor the Act

provides an effective definition of the term "physical or mental handicap."

At the Constitutional Convention, during the discussion of the provision, a few comments were made as to the scope of the term "physical or mental handicap." In response to a question as to what he considered the definition of physical handicap to be, Delegate Daley, one of the sponsors of the provision, stated:

> "Well, I would say polio victim, loss of one arm, a leg, finger, one eye, things like this—physically handicapped." (5 Record of Proceedings, Sixth Illinois Constitutional Convention 3679.)

Later, he made the following remarks:

> "Well, you just can't deny a person because he walks in the door because he has one arm; this is what we're saying in physically handicapped. When you look at him, you can't say, 'You can't have the job' without discussing it with him. If he cannot perform the job or does not have the ability, then you can deny the person. That's all." (5 Proceedings 3679.)

There exist, in the record of the proceedings of the convention, a few isolated references to certain other classes of disabilities by other delegates—such as speech defects, infantile paralysis and epilepsy. None of these comments were expressly made in reference to the question of what was meant by the term "physical or mental handicap" although the context in which they were made support an inference that the delegates considered these classes of disabilities to be covered by the provision. However, there is no indication in the record that the delegates ever agreed upon a precise formula for determining the scope of the term "physical or mental handicap."

[1, 2] In section 2 of the Equal Opportunities for the Handicapped Act (Ill. Rev. Stat., 1975, ch. 38, par. 65-22) the following definition of the term "physical or mental handicap" is provided:

> "The term 'physical or mental handicap' means a handicap unrelated to one's ability to perform jobs or positions available to him for hire or promotion . . . ."

Since this definition effectively begs the question of what constitutes a handicap for purpose of the Act, it is of little use to us. Generally, when the legislature has failed to provide a specific definition for a term or phrase used in a statute, this court must presume that the term or phrase was intended to be applied in its ordinary and popularly understood meaning. (*People* v. *Dednam* (1973), 55 Ill.2d 565, 304 N.E.2d 627; *Jackson* v. *Civil Service Com.* (1976), 41 Ill.App.3d 87, 353 N.E.2d 331.) Absent a complete explanation of the term "physical or mental handicap" in the statute, we feel obliged to look to the ordinary and proper definition of that term to make our determination of whether Klapacz is entitled to the protection of the Act. The same approach is also appropriate in interpreting the constitutional provision, for it is well established that the words in the Constitution are to be taken in their ordinary acceptance. *Locust Grove Cemetary Ass'n* v. *Rose* (1959), 16 Ill.2d 132, 156 N.E.2d 577; *Village of Elmwood Park* v. *Forest Preserve of Cook County* (1974), 21 Ill.App.3d 597, 316 N.E.2d 140.

Klapacz argues that under the ordinary and popularly understood meaning of the term, any individual is handicapped if he is prevented from fully enjoying his life because of a physical or mental condition. Insofar as the Equal Opportunities for the Handicapped Act purports to prohibit all employment discrimination against handicapped individuals, Klapacz claims that anyone who is denied employment on the basis of physical condition unrelated to his ability to fulfill the job is entitled to protection under the Act. Klapacz acknowledges that Sears denied him employment because he was an uninsurable risk under their program of self-insurance but argues that since his ineligibility for this insurance program was based upon his physical condition, he is handicapped within the meaning of the Act. In support of his interpretation of the common meaning of the term "physical

and mental handicap," Klapacz cites the definition of "handicap" provided in Webster's Third New International Dictionary 1027 (1976):

> ". . . a disad0vantage that makes achievement usually difficult; *esp.*: a physical disability that limits the capacity to work."

This definition has been relied upon by several other courts in resolving issues similar to the one presented here. See *Chicago, M., St. P. & P. R. Co.* v. *Washington State Human Rights Com.* (1976), 87 Wash.2d 802, 557 P.2d 307; *Chicago, M., St. P. & P. R. Co.* v. *State of Wisconsin* (1974), 62 Wis. 2d 392, 215 N.W.2d 443.

We find, however, that we cannot accept the plaintiff's interpretation of the common meaning of the phrase "physical and mental handicap." First, we feel that his approach would extend the proscriptions of the Act well beyond the scope intended by the legislature. Since virtually every consideration upon which an employer is likely to evaluate a prospective or current employee may be classified as either a mental or physical condition, the Act would be transformed into a universal discrimination law. Even such considerations as sex, age and race could be denominated as physical conditions and thus would be swept within the purview of the Equal Opportunities for the Handicapped Act. As Klapacz himself admits, these characteristics are generally considered to fall within a different category than mental or physical handicaps and the legislature has clearly dealt with them as being distinct. See, for example, the Fair Employment Practices Act, Ill.Rev.Stat., 1975, ch. 48, par. 851, et seq.

Moreover, we believe that the legislature had in mind a more objective criteria for determining what physical or mental conditions constitute handicaps within the meaning of the Act than that suggested by the plaintiff. In effect, he argues that for any physical condition to reach the level of a handicap to be protected by the Act, an employer need only act upon that condition and deny the

individual employment. We believe, however, that in enacting this legislation, the General Assembly had in mind a class of physical and mental conditions which are generally believed to impose severe barriers upon the ability of an individual to perform major life functions.

[3] Our interpretation, we feel is harmonious with the dictionary definition submitted by the plaintiff. Under his interpretation of this definition, the phrase "limits the capacity to work" means that the individual has been denied a job by an employer. Similarly, Klapacz reasons that the denial of employment also fulfills the requirement of this definition that the physical condition "makes achievement unusually difficult," since achievement is particularly difficult if a person is unable to get a job. However, the phrases "limit the capacity to work" and "makes achievement unusually difficult" more properly refer to an individual's ability to perform job-related tasks and not to the fact that he has been denied employment. Thus, the question of whether a person is handicapped turns upon whether the character of the disability is one which is generally perceived as one which severely limits the individual in performing work-related functions.

We are aware that our interpretation of the dictionary definition places us in conflict with the reasoning of the Wisconsin Circuit Court in *Chrysler Outboard Corp.* v. *Department of Industry, Labor and Human Relations* (1976), 14 Fair Empl.Prac.Cas. (BNA) 344. The Wisconsin statute prohibiting employment discrimination against handicapped individuals (Fair Employment Code, Wis.Stat.Ann., sec. 111.31, et seq. (1974)) like Illinois' Equal Opportunity for the Handicapped Act, does not contain an effective definition of what constitutes a handicap. In determining that an individual suffering from asthma was handicapped within the meaning of the Wisconsin Fair Employment Code the Wisconsin Supreme Court in *Chicago, M., St. P. & P. R. Co.* v. *Wisconsin* took guidance from the definition of "handicap" provided in

Webster's Third New International Dictionary. The Wisconsin Circuit Court in *Chrysler Outboard* v. *Department* interpreted the *Chicago, M., St. P. & P. R. Co.* v. *Wisconsin* court as having adopted the dictionary definition and, using the definition, determined that an individual suffering from acute lymphocytic leukemia was entitled to the protection of the Wisconsin Fair Employment Act. The Wisconsin Circuit Court made the following statement:

> ". . . In [*Chicago, M. St. P. & P. R. R. Co.* v. *Wisconsin*] the court approved a Department conclusion that the complainant's history of asthma constituted a handicap. If an employee's illness or defect makes it more difficult for him to find work, then it certainly operates to make achievement unusually difficult. The petitioner's refusal to hire the complainant in the instant case because of his illness is a classic example of how such an illness operates as a handicap. Complainant's illness clearly constitutes a 'handicap' within the meaning of the Wisconsin Fair Employment Act." 14 Fair Empl. Prac. Cas. (BNA) at 345.

From this language, we think it is clear that the Wisconsin Circuit Court followed the approach which the plaintiff has offered and which we have rejected. Insofar as the *Chrysler Outboard* v. *Department* decision conflicts with our views, we decline to follow it.

[4 ,5] Klapacz alleges that he has a history of nephritis and that immediately prior to applying for the position at Sears he underwent an operation for a kidney transplant. From these medical conditions, the only physical impairment which he claims is that he is restricted from lifting heavy weights. Since we are dealing with the question of whether the dismissal of his complaint was proper, we must accept his allegations as true. (*Lynch* v. *Devine* (1977), 45 Ill.App.3d 743, 4 Ill.Dec. 185, 359 N.E.2d 1137; *Benza* v. *Shulman Air Freight* (1977), 46 Ill.App.3d 521, 5 Ill.Dec. 91, 361 N.E.2d 91.) We do not believe that the disability alleged by Klapacz is of the nature which

falls within the commonly understood meaning of the term "physical handicap." Therefore, we affirm the trial court in its conclusion that Klapacz was not handicapped within the meaning of either article I, section 19 of the Illinois Constitution of 1970, or the Equal Opportunities for the Handicapped Act. We believe that this holding is also determinative of the question of whether Advocates has standing in the suit. We also affirm the trial court's dismissal of Advocates' claims. Under the pleadings, all of the injuries for which Advocates now seeks relief flow from Sears' alleged refusal to hire Klapacz in violation of the Illinois Constitution and the Act. We have already determined, however, that Klapacz cannot maintain a suit since he is not handicapped and, therefore, he was not entitled to the protection of those provisions and thus suffered no injury. Since, under Advocates' allegations, the existence of its injuries is dependent upon Klapacz's injuries, the dismissal of his claims requires the dismissal of Advocates' claims.

The views we have already expressed effectively dispose of this appeal; therefore, we have no need to consider the question of whether the Equal Opportunities for the Handicapped Act is unconstitutionally vague. *People* v. *Dixon* (1963), 28 Ill.2d 122, 190 N.E.2d 793; *In re Ross* (1975), 29 Ill.App.3d 157, 329 N.E. 2d 333.

For the reasons stated, we affirm the decision of the Circuit Court of Cook County.

Affirmed.

McNamara and Jiganti, *JJ.*, concur.

ILLINOIS SUPREME COURT
Clell L. Woods, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

March 29, 1979

Mr. Melvin M. Landau
Attorney at Law
77 W. Washington St.
Chicago, IL 60602

No. 51643—Advocates for the Handicapped, an Illinois corporation, et al., etc., petitioners, vs. Sears, Roebuck and Co., a New York corporation, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

STATE OF ILLINOIS
Office Of
CLERK OF THE SUPREME COURT
Springfield
62706

Clell L. Woods
Clerk

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May 15, 1979

Mr. Melvin M. Landau
Attorney at Law
77 W. Washington Street
Chicago, IL 60602

In re: Advocates for the Handicapped, etc., et al., petitioners, vs. Sears, Roebuck and Co., etc., respondent. No. 51643

Dear Mr. Landau:

The Supreme Court today made the following announcement concerning the above entitled cause:

The motion by petitioners for reconsideration of the order denying petition for leave to appeal is denied.

The portion of the motion by William J. Scott, Attorney General of Illinois, for leave to intervene is allowed. The part of the motion for reconsideration of the order denying petition for leave to appeal is denied.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

CLW:jae
cc:Wm. J. Scott—160 N. LaSalle
Legal Assistance Foundation
of Chicago
Arnstein, Gluck, Weitzenfeld
& Minow

In The

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department, Chancery Division

ADVOCATES FOR THE HANDICAPPED, et al.,
Plaintiffs,

v.

SEARS ROEBUCK & COMPANY,
Defendant.

No. 75 CH 3431

ORDER

This matter coming on to be heard pursuant to defendant's Motion to Dismiss the Complaint and Amended Count I of the Complaint, due notice having been given, the Court being fully advised in the premises, the facts not being in dispute, and the COURT FINDING AS A MATTER OF LAW:

1. That the plaintiff Advocates for the Handicapped, an Illinois corporation, is not personally aggrieved and therefore has no standing to maintain this cause of action, and
2. That the plaintiff Dennis Klapacz is not "handicapped" and therefore is neither within the protection of Ill.Rev.Stat. Ch. 38, §65-21 nor a member of the class he purports to represent;

IT IS HEREBY ORDERED:

That defendant's Motion to Dismiss the Complaint and Amended Count I of the Complaint be, and the same hereby is, granted, and that defendant go hence without day.

ENTER: L. Sheldon Brown
DATE: April 23, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-607

ADVOCATES FOR THE HANDICAPPED, AN ILLINOIS CORPORATION AND DENNIS KLAPACZ, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioner,

vs.

SEARS, ROEBUCK AND CO., A NEW YORK CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BURTON Y. WEITZENFELD,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-607

ADVOCATES FOR THE HANDICAPPED, AN ILLINOIS CORPORATION AND DENNIS KLAPACZ, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioner,

vs.

SEARS, ROEBUCK AND CO., A NEW YORK CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associates Justices of the Supreme Court of the United States:

Respondent, Sears Roebuck and Co., pursuant to Rule 24 of this Court [U. S. Sup. Ct. Rule 24, 28 U. S. C.], respectfully submits this brief in opposition to the Petition for Writ of Certiorari and prays that for the reasons stated herein said petition should be denied.

OPINION BELOW.

The opinion of the Appellate Court of Illinois, First District is reported at 67 Ill. App. 3d 512, 385 N. E. 2d 39 (1978).

JURISDICTION.

The jurisdictional requisite which Petitioners advance has not been satisfied. This case involves no federal question. Moreover, Petitioners made no attempt to raise a purported federal question until after the Illinois Supreme Court had denied their petition for leave to appeal.[1] That belated attempt was not timely and, therefore, no federal question is preserved for review, even if one existed.

QUESTIONS PRESENTED.

The questions appearing under the heading "Questions Presented" in the Petition do not accurately represent the issues. Rather, Respondent submits that the real issues involved in this case are:

1. Whether the single issue decided by the Illinois courts, to wit, whether Petitioner Klapacz was physically handicapped within the meaning of the Illinois Equal Opportunities for the Handicapped Act, involves a federal question.

2. Whether Petitioner raised the purported existence of any federal question below so that it is preserved for review by this Court in any event.

STATEMENT OF THE CASE.

The Petitioners filed suit against Respondent Sears, Roebuck and Co. in the Circuit Court of Cook County, Illinois, seeking relief under the Illinois Equal Opportunities for the Handicapped Act, Ill. Rev. Stat. Ch. 38 §§ 65-21, *et seq.* (hereinafter "the

1. Petitioners denominated their final attempt for state court review, after their petition for leave to appeal was denied, a "petition for reconsideration." However, it was filed pursuant to Illinois Supreme Court Rule 367—"Rehearing in Reviewing Court" [Ill. Rev. Stat. Ch. 110A, § 367]. Under this rule such a paper is called a "petition for rehearing." Accordingly, Respondent will refer to this petition as one for "rehearing," rather than "reconsideration."

Act"). Petitioners did *not* raise any federal statutory or constitutional claims in their initial complaint or their amended complaint. Respondent moved to strike and dismiss the original and amended complaints, and the Circuit Court so ordered on the ground that Petitioner Klapacz was not "handicapped" within the meaning of the Act.[2]

Petitioners appealed the trial court's order to the Appellate Court of Illinois. They raised no purported federal question in their arguments to that Court. The Appellate Court affirmed the trial court's ruling that Petitioner Klapacz was not handicapped within the meaning of the Act. Its decision involved no federal question.

Petitioners next sought review in the Supreme Court of Illinois by filing a petition for leave to appeal. Here too, Petitioners raised no federal claims. The Supreme Court denied the petition.

Finally, after their petition for leave to appeal had been denied, Petitioners petitioned the Illinois Supreme Court for a rehearing. It was not until this final state court paper was filed, some years after the original complaint, that Petitioners so much as suggested that their claim involved a federal question.[3] The Supreme Court of Illinois denied this final petition for rehearing. Under Illinois law, issues not previously raised may not be entertained upon a petition for rehearing.

2. A motion to dismiss admits all well-pleaded facts stated in the complaint under Illinois law. *Stenwall* v. *Bergstrom,* 398 Ill. 377 (1947) *Eckhoff* v. *Forest Preserve District,* 377 Ill. 208 (1941). Since Respondent thus admitted all the facts raised in the complaint, including the details of Klapacz' physical condition, it is impossible for Respondent to understand how Petitioners can seriously contend that their due process rights have been violated because they were "denied an evidentiary hearing" below.

3. The petition for rehearing asserted, *inter alia,* a vague and general claim of denial of equal protection. An "equal protection" claim is also contained in the Petition for Writ of Certiorari. However, not one of the other purported federal questions asserted in the Petition for Writ of Certiorari was *ever* raised in *any* fashion before the Illinois courts. (See note 5, *infra*)

It is thus clear that the only questions involved in this case are questions of state law. The Illinois courts' decisions were based wholly on state law, with no allusion to any federal questions and Petitioners' untimely, indeed desperate, attempt to argue a purported federal question cannot change the facts. This Petition for Certiorari is merely an improper and belated attempt to convert a simple factual question—whether Petitioner Klapacz is handicapped within the meaning of Illinois law—into a purported violation of a federally protected right. The attempt should not be permitted to succeed.

ARGUMENT.

I.

This Case Does Not Involve a Federal Question.

Throughout the proceedings below, the Illinois courts dealt with only one substantive issue, i.e. whether Petitioner Klapacz was handicapped within the meaning of Illinois law. The Illinois courts were called upon to construe and interpret only an Illinois statute,[4] not a federal statute or any right allegedly arising under federal law or the United States Constitution. This Court has repeatedly held that it will not review a state court's interpretation of its own statutes and will not substitute its own judgment for that of a state court.

> This Court is bound by the interpretation given to [a state] statute by the Supreme Court of that State . . . *First National Bank of Garnett* v. *Ayers*, 160 U. S. 660, 665 (1896).

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4. It is doubtful that even a state constitutional issue was ever reached by the lower courts, as Petitioners also contend. The trial court simply held that Klapacz was not "physically handicapped" within the meaning of the Act. The Appellate Court clearly held that it was affirming the trial court's ruling that Klapacz was not "physically handicapped." Although the Appellate Court also mentioned that ". . . Klapacz was not physically handicapped within the meaning of . . . Article I, Section 19 of the Illinois constitution . . . ," this language obviously had no effect upon its holding affirming the trial court's ruling that Klapacz was not handicapped within the meaning of the Act. The Illinois Supreme Court well understood this when it denied Petitioners' leave for appeal. In any event, this Court has held that interpretation of state constitutions, like state statutes, is within the exclusive province of the state courts, *Atty. General* v. *Lowrey*, 199 U. S. 233 (1905); *Lombard* v. *West Chicago Park*, 181 U. S. 33 (1901); it is, of course, equally well settled that courts will decide a constitutional question *only* where it is necessary to decide the case. *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947); *District of Columbia* v. *Little*, 339 U. S. 1 (1949); *City of Detroit* v. *Gould*, 12 Ill. 2d 297 (1957); *People ex rel. Downs* v. *Scully*, 408 Ill. 556 (1951).

* * * * *

> What the statutes of a State mean, the extent to which any provision may be limited by other parts of the same Act, are questions on which the highest court of the State has the final word. The right to speak this word is one which State courts should jealously maintain and which we should scrupulously observe. *Musser* v. *Utah*, 333 U. S. 95, 98 (1948).

* * * * *

> We are, of course, bound to accept the interpretation of [state] law by the highest court of the State. *Hortonville Joint School Dist. No. 1* v. *Hortonville Education Assn.*, 426 U. S. 482, 488 (1976).

There can be no doubt that Petitioners' request for Certiorari is simply an improper plea that this Court substitute a different interpretation of Illinois law in lieu of that which three Illinois courts have carefully ascribed. In essence, what Petitioners contend is that the Illinois courts' interpretation of "handicapped" for purposes of the Illinois Act is wrong because Klapacz is not included within that definition.

To be sure, Respondent believes the Illinois courts correctly decided that Petitioner Klapacz, whose sole restriction was a limitation of heavy lifting, was not "physically handicapped" within the meaning of Illinois law. But of even more importance, such questions are routinely decided by state courts and not reviewed by this Court simply because the statute might be susceptible to a different interpretation. The fact that other states may have chosen to interpret their statutes differently than Illinois creates neither a "federal question" nor a "special or important reason" to grant Certiorari. Indeed this Court has uniformly recognized that state courts are not required to construe similarly worded statutes in the same fashion.

> [W]hen a statute of two states, expressed in the same terms is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it.

Supreme Lodge, Knights of Pythias v. *Meyer*, 265 U. S. 30, 35 (1924) (quoting *Louisiana* v. *Pilsbury*, 105 U. S. 278, 294 (1881). Hence, the fact that other jurisdictions may have interpreted their own statutes differently than Illinois simply provides no grounds at all for this Court to grant review.

At the risk of repetition, but in the hope of clarity, Respondent once again quotes this Court:

> We have repeatedly held that *it is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it.* (emphasis supplied)

Southwestern Bell Telephone Co. v. *Oklahoma*, 303 U. S. 206, 212-13 (1937). There is simply no doubt that Petitioners cannot meet the basic and well established requirements for review by this Court. Thus, the Petition for Writ of Certiorari should be denied.

II.

Petitioners Did Not Timely Raise a Purported Federal Question Below.

As shown above, there is simply no federal question involved in this case. However, assuming *arguendo*, that it could be said a federal question was a part of this case, still Certiorari would not lie. Clearly, Petitioners have not met the additional

requirement that a federal question must be first timely raised in the lower courts before it will be considered by this Court.

The Petition for Certiorari attempts to mask exactly when an alleged federal question was first raised below. But this attempt to obfuscate the record is found wanting upon examination of Petitioners' initial and amended complaints, their briefs before the Illinois Appellate Court, and their petition for leave to appeal to the Supreme Court of Illinois. Nowhere in this myriad of papers did Petitioners so much as suggest the existence of any federal question.

Uniformly unsuccessful in their state law arguments, Petitioners then belatedly attempted to assert, for the first time, a purported federal question in their petition for rehearing to the Supreme Court of Illinois.[5]

But, this Court has held that the

> [f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the state has a legitimate interest in enforcing its procedural rule . . . *Michigan* v. *Tyler*, 436 U. S. 499, 512, n.7 (1978). (Also: *Newsom* v. *Smyth*, 365 U. S. 604, 605 (1961).)

and, under Illinois procedure and law, new questions cannot be raised for the first time in a petition for rehearing. If a question has not been raised before, it is deemed to have been waived. Thus, the Rules of the Supreme Court of Illinois provide:

> Appellant's Brief. The appellant's brief shall contain the following parts in the order named:
>
> * * *
>
> Argument . . . *Points not argued* [*in Appellant's brief*] *are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.* Ill. Rev. Stat. Ch. 110A, § 341(e)(7). (emphasis supplied)

5. The claim was a vague and general allegation that equal protection had been denied. While the Petition for Certiorari asserts an "equal protection" claim, it also asserts several other purported federal questions, *none* of which were *ever* presented to the Illinois courts in *any* fashion. (See note 3, *supra.*)

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> Rehearing in Reviewing Court.
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> Contents. The petition shall state briefly the points claimed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the record and briefly relied upon, and with authorities and argument, concisely stated in support of points. Reargument of the case shall not be made in the petition. Ill. Rev. Stat. Ch. 110A, § 367(c).

The Illinois courts have applied the rule precluding the use of a petition for rehearing to raise new issues in numerous situations, *including that of a question bottomed upon the federal constitution.* Thus, in *People* v. *Mallett*, 45 Ill. 2d 388, 397-98 (1970) the Illinois Supreme Court refused to consider an argument that appointed trial counsel had been incompetent, raised for the first time in a petition for rehearing, and held:

> By our rules and decisional law a new contention cannot, for the first time, be urged in a petition for rehearing. Rule 367(b) specifically provides for rehearing only on those 'points claimed to be overlooked or misapprehended by the court' in its original opinion. Having failed to raise this contention on [appellant's] original hearing, [appellant] may not urge it on rehearing. (citations omitted)

See also: *Scott* v. *Scott*, 307 Ill. 586 (1923), *Chicago Park Dist.* v. *Kenroy Inc.*, 58 Ill. App. 3d 879 (1978), and *People* v. *Krueger*, 237 Ill. 357 (1908), involving and rejecting a belated attempt to raise a question under the Illinois constitution.

Obviously, Petitioners failed to timely raise the existence of a purported federal question before the Illinois courts. Accordingly, they would be barred from making such an assertion here, even if it could somehow be said that a federal question existed.

CONCLUSION.

There is no federal question here, either involved or preserved; nor are there novel or unique issues. All this case involves is the application of state law to the individual facts before the courts below. Respondent respectfully urges that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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